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No. 02-763

In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PAULINE THOMAS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute that, in light of the Social Security Act's "complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience," *Barnhart* v. *Walton*, 535 U.S. 212, 225 (2002), Congress "conferred on the [Commissioner] exceptionally broad authority to prescribe standards for applying certain sections of the Act," *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981); Gov't Br. 21-22. And respondent concedes that, under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Walton*, *supra*, the Commissioner's construction of 42 U.S.C. 423(d) must be upheld unless "the statute unambiguously forbids" it or, "for other reasons," it "exceeds the bounds of the permissible." 535 U.S. at 218; Gov't Br. 21.

Respondent, however, makes neither showing. Section 423(d)(2)(A)'s text does not "unambiguous[ly]" bar (Resp. Br. 20) the Commissioner's construction that the "significant numbers" in "the national economy" requirement applies to "other * * * work," but not to "previous work" the claimant has done before. To the contrary, the text on which respondent focuses at most exhibits the sort of ambiguity the Commissioner is empowered to resolve. Thus, while respondent argues that the words "any other" in Section 423(d)(2)(A)

compel the conclusion that "previous work" (like "other * * * work") must "exist[] in the national economy" in "significant numbers," *FTC* v. *Mandel Brothers*, 359 U.S. 385, 389 & n.4 (1959), rejected an indistinguishable argument. Gov't Br. 29-31. Respondent's claim of textual clarity is also belied by decades of judicial decisions rejecting the very interpretation respondent proposes. Gov't Br. 31-32; Pet. 18-20; p. 7, *infra*.

Respondent also fails to grasp the significance of the language in Sections 423(d)(1)(A) and (2)(A) that serves to maintain the essential distinction between a disability program and an unemployment program. Those provisions require that the impairment and its severity, not other causes such as technological change, be the reason for the claimant's inability to do her previous work. Respondent's position conflicts with more than four decades of administrative construction adhering to that central requirement, which Congress has repeatedly endorsed while amending the Act (and the definition of disability) in other respects.

Ultimately, respondent's submission reduces to her repeated assertion that the Commissioner's construction leads to "ludicrous" results and represents "bad public policy." Resp. Br. 42; see *id.* at 25, 43. But that argument rests on the wholly unsubstantiated and unrealistic scenario of a claimant who is physically incapable of performing *any* job except her particular past job, only to have that job disappear. Resp. Br. 1 ("the only job an individual can physically perform is no longer in existence"). There is nothing in Section 423(d)'s text or history that suggests that Congress intended to design the statutory standards for administering this massive program around that remote hypothetical. Nor is there anything to suggest that Congress sought to mandate, for all workers performing occupations that do not exist in significant numbers in the national economy, a categorical exemption from the generally applicable disability requirement that their impairments render them physically or mentally unable to perform their former jobs. The point of the past-work inquiry is not "that [a claimant] can actually

be employed in her past job, but that she is able to do a certain level of work." Pet. App. 23a (Rendell, J., dissenting). It thus represents an accurate measure of capacity to work more generally, whether or not that particular past job exists in significant numbers. Indeed, unlike the generalizations embodied in the grid regulations used at step five of the sequential evaluation process to determine whether a claimant can adjust to "other * * * work" she has not before performed, a claimant's continued capacity to do the work she did in the past is a readily available, individualized, and concrete measure. In a system that handles millions of claims each year, the need for such a ready, accurate, and claimant-specific screening measure is particularly acute.

A. The Commissioner's Construction Is Supported, Not Foreclosed, By The Text Of Section 423(d)

1. Departing from the court of appeals' reasoning, respondent argues (Br. 20) that the words "do" and "engage" in Section 423(d)(2)(A) require inquiry into the availability of the claimant's previous work because a claimant cannot "do" or "engage in" a job that is not "an existing occupation." Resp. Br. 21. Respondent misreads the statutory text.

First, Section 423(d) by its terms does not mandate benefits whenever the claimant is unable to engage in a prior job, for whatever reason. Rather, Section 423(d)(1)(A) requires the claimant to be unable to work "*by reason of*" his impairments, while Section 423(d)(2)(A) precludes a finding of disability unless the impairments are "*of such severity that* he is * * * unable to do his previous work" (and "any other kind of substantial gainful work"). 42 U.S.C. 423(d)(1) and (2)(A) (emphases added). Consequently, it must be the impairment and its severity that render the claimant "unable to do" previous work. Gov't Br. 25. For example, a claimant who is physically capable of performing a former job but is banned from the industry does not become "disabled" by virtue of the ban. Such a claimant is not "unable to do" that job "by reason of" an impairment; nor does he have an impairment of

"such severity that he is * * * unable to do his previous work." The same is true of a claimant asserting inability to do her former job solely "because that job does not exist in significant numbers in the national economy." Resp. Br. 26.

Second, in the context of a disability program concerned with the effects of "physical or mental impairment[s]," the phrases "unable to do" and "cannot * * * engage" necessarily refer to the physical and mental *capacity* to perform the job —what the Commissioner refers to as "residual functional capacity" or "RFC," see *Bowen* v. *City of New York*, 476 U.S. 467, 471 (1986)—not the claimant's ability to obtain that job in view of other factors. The Commissioner's regulations thus advise claimants that "*[y]our impairment(s)* must prevent you from doing your past relevant work." 20 C.F.R. 404.1520(e), 416.920(e) (emphasis added). And they explain that the Commissioner determines ability to "do" past work by examining the claimant's residual functional capacity and comparing that to the demands of the prior work. *Ibid.*; Gov't Br. 7. Indeed, to eliminate any possible misunderstanding, the Commissioner, in regulations signed May 22, 2003, amended 20 C.F.R. 404.1560(b) and 416.960(b) to state explicitly that the agency does "not consider * * * whether your past relevant work exists in significant numbers in the national economy" when evaluating ability to do past relevant work. 68 Fed. Reg. 51,153, 51,163, 51,166 (2003) (to be codified as 20 C.F.R. 404.1560(b)(3), 416.960(b)(3)).[1]

[1] The amendment to 20 C.F.R. 404.1560(b) and 416.960(b) was made as part of a comprehensive rulemaking directed primarily to other matters, particularly the allocation of the burden of proof at steps four and five of the sequential evaluation process. 67 Fed. Reg. 39,904 (2002) (notice); 68 Fed. Reg. at 51,153. In response to a public comment requesting that she "clarify" that past work must exist in significant numbers in the national economy, the Commissioner explained that the clause "'which exists in the national economy' relates to 'any other substantial gainful activity'" but not "to 'previous work,'" and that the agency therefore "do[es] not consider job prevalence" when evaluating ability to do previous work. *Id.* at 51,159. The amendment to 20 C.F.R. 404.1560(b) and 416.960(b) "ensure[s] that other members of the public do not misunderstand this." *Ibid.*

Third, respondent's contention that the words "unable to do" or "cannot * * * engage" require examination of the claimant's realistic "ability to comp[]ete in the open market" or obtain "real jobs" that "pay bills" (Br. 19, 26) renders Section 423(d)(2)(A) self-contradictory. Section 423(d)(2)(A) expressly states that the claimant's ability to perform work precludes a finding of disability, for example, "regardless of * * * whether he would be hired if he applied for work." Disability insurance protects workers against the loss of physical and mental capacity to perform their former job or any other work, not against inability to get a job. The Senate and House Reports accompanying Section 423(d)(2)(A)'s enactment in 1967 made the same point: "While such factors as * * * whether there are job openings, or whether [the claimant] would or would not actually be hired may be pertinent in relation to other forms of protection, they may not be used as a basis for finding an individual to be disabled." S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967); H.R. Rep. No. 544, 90th Cong., 1st Sess. 30 (1967).[2]

[2] Respondent quotes (Br. 19) the 1960 Preliminary Report on the *Administration of Social Security Disability Insurance Program* of the Staff of the Subcommittee on the Administration of the Social Security Laws of the House Committee on Ways and Means, 86th Cong., 2d. Sess. 20 (*1960 Report*), which states that "theoretical capacity * * * can be somewhat meaningless if it cannot be translated into an ability to compete in the open labor market." But respondent fails to quote the next sentence, which urges the Commissioner to perform a "study of this situation to see if criteria can be developed." *Ibid.* The Commissioner's 1961 regulations and the enactment of Section 423(d)(2)(A) in 1967 were the response to that suggestion. See pp. 9-13, *infra*. The legislative history of Section 423(d)(2)(A) makes it clear that Congress sought to overrule court decisions that, purporting to adopt a "practical" approach, had awarded benefits to claimants who were physically capable of working but realistically would not be "considered for" jobs "by reason of hiring practices." S. Rep. No. 744, *supra*, at 47-48; H.R. Rep. No. 544, *supra*, at 29. Respondent also ignores the *1960 Report*'s acknowledgment (at 19) that "[l]ack of ability to engage in a job is essential" to disability determinations, but "[l]ack of ability to get a job * * * is immaterial."

2. Falling back to the court of appeals' reasoning, respondent also relies (Br. 20-21, 22, 26-27) on the word "other" in the phrase "not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any *other* kind of substantial gainful work which exists in the national economy," 42 U.S.C. 423(d)(2)(A) (emphasis added). The words "any other kind of," respondent insists, would "serve no purpose" unless they required "previous work" (like "other * * * work") to exist in "significant numbers in the national economy." Resp. Br. 21, 22. That argument lacks merit.

Under the Commissioner's construction, the words "any other kind of" are not superfluous. Instead, they indicate that the "previous work" (like the "other * * * work") that can render a claimant ineligible for benefits is to be "substantial gainful work," as respondent concedes. See Resp. Br. 21 (previous work must be "substantial and gainful"); Gov't Br. 33. Respondent thus errs in contending (Br. 21-22) that Congress would have omitted the words "other kind of" had it intended the agency's construction; that omission would suggest that the "previous work" need not have been either "substantial" or "gainful" to disqualify a claimant for benefits. Indeed, respondent's hypothetical version of Section 423(d)(2)(A) (see Br. 20) would do just that. It would preclude a finding of disability unless the claimant is both unable to do his "previous work and cannot * * * engage in any substantial gainful work which exists in the national economy." Resp. Br. 20. Unlike the actual text of Section 423(d)(2)(A), respondent's hypothetical text does not indicate that "previous work" is to be "substantial gainful work."

Consequently, the only question here is whether the words "any other kind of"—in addition to clarifying that "previous work" is to be "substantial gainful work"—also unambiguously require previous work to "exist[] in the national economy" in "significant numbers." As to that question, *Mandel Brothers*, 359 U.S. at 389-390 & n.4, is controlling. See Gov't Br. 29-30. In *Mandel Brothers*, this

Court rejected the argument that the word "other" in the phrase "purchaser, consignee, * * * *or any other person who is engaged in dealing commercially in fur*," 359 U.S. at 386 (emphasis added), required that a "purchaser" or "consignee" be a person "who is engaged in dealing commercially in fur." Instead, the Court held that the word "other" introduced ambiguity. *Id.* at 389. The Court then invoked the rule that a "limiting clause is to be applied only to the last antecedent" to hold that the limiting clause "who is engaged in dealing commercially in fur" applied *only* to the words it immediately followed, "other person," and not to more remote words such as "purchaser" or "consignee." *Id.* at 389-390. Likewise here, in the phrase "not only unable to do his previous work but cannot * * * engage in any other kind of substantial gainful work which exists in the national economy," the words "any other kind of" do not require that "previous work" be work "which exists in the national economy" in "significant numbers." Gov't Br. 26, 30-31. Instead, that requirement applies only to the last antecedent, "other * * * work"—as the Commissioner has long held, Gov't Br. 3-7, 34-37, 39-41, and as every court that has considered the issue for the past three decades (until the decision below) has agreed. See *Quang Van Han* v. *Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989); *Pass* v. *Chater*, 65 F.3d 1200, 1203-1204 (4th Cir. 1995); *Garcia* v. *Secretary of HHS*, 46 F.3d 552, 558 (6th Cir. 1995); *Rater* v. *Chater*, 73 F.3d 796 (8th Cir. 1996).[3]

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[3] Although respondent concedes (Br. 36-37) that *Pass* and *Chater* sustain the Commissioner's construction, see Gov't Br. 31, 41-42; Pet. 19-20, she attempts to distinguish *Quang Van Han* (Br. 34) by citing the opinion's passing remark that a claimant "may" be able to challenge certain applications of the Commissioner's rules. But *Quang Van Han* unambiguously rejected respondent's view, holding that while "the Act requires 'other' work to exist in the United States, it places no such limitation on 'previous' work." 882 F.2d at 1457; *ibid.* ("limitations governing other work do not modify previous work"); Gov't Br. 26, 31. Respondent's attempted distinction of *Garcia* (Br. 34-36) ignores the court's clear holding that the Act's text "easily bears" the Commissioner's construction, *Garcia*, 46 F.3d at 558-559; respondent's claim that an alternative holding

Respondent does not deny that *Mandel Brothers* rejected the very construction that she now insists is mandated by the grammatically parallel statutory text at issue here. Instead, respondent urges that *Mandel Brothers* never "suggest[ed] that it had created a rule with any future precedential value." Resp. Br. 23. But *Mandel Brothers* nowhere suggests that it was meant to lack precedential force, and the rule of the last antecedent it invokes is well established. Gov't Br. 30-31. Nor can respondent distinguish *Mandel Brothers* on the ground (Br. 23) that the construction adopted there "further[ed] the objective of the statute." The Commissioner's construction here likewise furthers the objectives of the statute by promoting an administrable and accurate disability program that emphasizes medical factors. Gov't Br. 41-47; p. 19 & n.10, *infra*. That construction also reflects the reasonable conclusion that, in enacting Section 423(d)(2)(A), Congress was cognizant of and sought to preserve the distinct treatment of previous work and other work long reflected in agency regulations, written guidance, and judicial decisions. See Gov't Br. 39-40; pp. 11-13, *infra*.

Respondent's reliance (Br. 26-27) on the court of appeals' grammatical analogies (Pet. App. 8a) is similarly misplaced. Those analogies neither parallel the structure of Section 423(d)(2)(A) (see Gov't Br. 32-33), nor prove the Third Circuit's newly minted rule that, "[w]hen a sentence sets out one or more specific items followed by 'any other' and a description, the specific items must fall within the description." Pet. App. 8a. The construction this Court adopted in *Mandel*

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suggests a different result in other circumstances is unpersuasive. Finally, the dictum from *Kolman* v. *Sullivan*, 925 F.2d 212 (7th Cir. 1991), cited by respondent (Br. 37-38) did not rely on (or address) the *text* of the Act; instead, it invoked a (mistaken) view of the regulations. See Gov't Br. 31 n.8. To the extent that *Kolman*'s dictum echoes respondent's policy concern, *Kolman* never suggested that the remote hypothetical it cited (the ice cutter who can do no other work and whose job is rendered obsolete by refrigerators) is realistic or could justify overturning a longstanding construction recognized by Congress.

Brothers defies that supposed rule, as do the examples set forth in the government's brief (at 32-33). Thus, one might say "not only have I not seen a tiger, but I have not seen any other large animal which can climb higher than a tiger." That statement obviously does not imply that a "tiger" must be a "large animal which can climb higher than a tiger"; it means only that a tiger is a "large animal." Similarly here, Section 423(d)(2)(A)'s language—"not only unable to do his previous work but cannot * * * engage in any other kind of substantial gainful work which exists in the national economy" in "significant numbers"—indicates that "previous work" is a "kind of substantial gainful work," but it does not unambiguously mandate that previous work also must "exist in the national economy" in "significant numbers."[4]

B. The Legislative Evolution And Longstanding Administrative Construction Of Section 423(d) Contradict Respondent's Position

1. Respondent does not dispute that the Act's legislative history repeatedly contradicts her position. See Gov't Br. 34-35, 38-39. For example, the Senate Report accompanying the 1954 enactment of the "disability" definition directed the Commissioner to "require[] that the individual be *disabled not only for his usual work* but also for any type of substantial gainful activity." S. Rep. No. 1987, 83d Cong., 2d Sess. 21 (1954) (emphasis added). The House Report accompanying the 1965 amendments reflected the same understanding:

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[4] Although respondent complains (Br. 27) that two of the three examples offered in the government's brief "definitively exclude[] any possibility that" the first "item * * * could ever constitute a related subcategory of the [later] descriptive phrase," that is precisely the point. Sometimes, as in *Mandel Brothers* and here, earlier categories (such as "previous work" or "tiger") fall within the first part of a category following the words "any other kind of" (such as "substantial gainful work" or "large animal"), but *not* within a succeeding limiting clause (such as "which exists in the national economy" or "which can climb higher than a tiger"). Respondent, moreover, offers no answer to the third example in the government's brief (at 33).

> In line with the original views expressed by your committee and since reaffirmed, to be eligible an individual must demonstrate that he is not only unable, *by reason of a physical or mental impairment, to perform the type of work he previously did*, but that he is also unable, taking into account his age, education, and experience, to perform any other type of substantial gainful work, regardless of whether or not such work is available to him in the locality in which he lives.

H.R. Rep. No. 213, 89th Cong., 1st Sess. 88 (1965) (emphasis added). Respondent's claim that she is entitled to benefits even though she has the physical and mental capacity to do her former job cannot be reconciled with those reports: She is not "*disabled*" from her "usual work." Nor is she "unable, *by reason of a physical or mental impairment*, to perform the type of work [s]he previously did." See Gov't Br. 35-36.

Respondent's position likewise contradicts the House and Senate Reports accompanying Section 423(d)(2)(A)'s enactment in 1967. See Gov't Br. 37-38. Each of those reports acknowledged the Commissioner's separate treatment of previous work and other work, explaining that the Commissioner has the burden of showing the existence of "other" work the claimant can do only after "the claimant has shown inability to perform his usual vocation." S. Rep. No. 744, *supra*, at 47; H.R. Rep. No. 544, *supra*, at 29. Indeed, those reports directly parallel the Commissioner's construction, describing previous work and other work in entirely separate clauses, and using the phrase "which exists in the national economy" to limit "other * * * work" but not "previous work":

> The language added by the bill would provide: * * * that *if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability*; and that if, considering the severity of his impairment together with his age, education, and experience, he has the ability to engage *in some other type of substantial gainful work that exists in the national economy even th[]ough he can no longer do his previous work*, he also is not under a disability regardless of whether or not such work exists in the general area in which he lives or whether he would be hired to do such work.

H.R. Rep. No. 544, *supra*, at 30 (emphasis added); S. Rep. No. 744, *supra*, at 48-49; *Garcia*, 46 F.3d at 558 (legislative history qualifies "other * * * work" but not "previous work"); SSR 82-40 (1982) (same) (*available in* 1982 WL 31388, at *2).

2. For more than four decades, the Commissioner has construed the definition of disability to require that a claimant be unable to perform her previous work because of a physical or mental impairment, and not because of other factors such as layoffs or technological change. Respondent does not deny that that construction is reflected in the Commissioner's 1955 *Disability Freeze State Manual* (see Gov't Br. 34), and early regulations (Gov't Br. 4-5, 36). See 25 Fed. Reg. 8100 (1960) (codified at 20 C.F.R. 404.1502(b) (1961)) (claimant not disabled if "unemployed for a reason or reasons not due to his physical or mental impairment but because of * * * technological changes in the industry in which he has worked"). Nor does she deny that the Commissioner's construction appears repeatedly in congressional reports and court decisions published throughout the 1960s. Gov't Br. 19, 34-39; pp. 9-11, *supra*; *e.g.*, *Massey* v. *Celebrezze*, 345 F.2d 146, 149 (6th Cir. 1965) ("emphasiz[ing] that" the claimant "was not unemployed because of * * * technological changes in the industry in which he had been employed"); *May* v. *Gardner*, 362 F.2d 616, 618 (6th Cir. 1966) (benefits properly denied where claimant "failed to establish" that he was "disabled from following his usual occupation").[5]

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[5] Contrary to respondent's assertion (Br. 31-33), *May* v. *Gardner* cannot be distinguished on the ground that the claimant there failed to show that his usual work did not exist in significant numbers in the *national* economy. The "significant numbers" in the "national economy" standard was not introduced until the enactment of Section 423(d)(2)(A) in 1967, a year after *May* was decided. That decision, moreover, nowhere suggests that work in the claimant's former occupation—mine dispatcher—was

Indeed, only months before Congress enacted Section 423(d)(2)(A) in 1967, the Commissioner issued an OASI Disability Insurance Letter to the state agencies responsible for making initial disability determinations, see 42 U.S.C. 421(a)(1), reiterating that a "finding of disability * * * should be made under §404.1502(b) *only* when the evidence establishes (1) the individual is unable to do his customary work by reason of a medically determinable impairment; and (2) there is no substantial gainful activity available to him in the economy that he has capacity to perform." SSA, OASI Disability Insurance Letter No. III-3 (Disability Insurance State Manual, Pt. III), at 2 (July 4, 1967). Finally, that same understanding was incorporated into the five-step sequential evaluation process formalized in 1978, Gov't Br. 40 n.9, and current regulations, Gov't Br. 7. See *Bowen* v. *Yuckert*, 482 U.S. 137, 141 (1987) (fourth step "determines whether *the impairment* prevents the claimant from performing work he has performed in the past") (emphasis added).

That longstanding construction, see *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933); Gov't Br. 21-22, is particularly significant given that Congress has left it unaltered for more than four decades, as it repeatedly amended the Act (and the definition of disability) in other respects. Gov't Br. 34-39. Even after the courts upheld that construction in *Quang Van Han*, *Garcia*, *Pass*, and *Rater*, Congress in 1996 amended the definition of disability by adding 42 U.S.C. 423(d)(2)(C) (addressing impairments based on alcoholism and drug addiction), again without disturbing

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available *outside* the area where the claimant worked. Rather, it required the claimant to show that he was "disabled" from doing that previous occupation, *i.e.*, that an impairment rendered him physically incapable of performing it. Thus, *May* (like Section 423(d)(2)(A)'s legislative history and cases such as *Massey* v. *Celebrezze*, *supra*, and *Reyes Robles* v. *Finch*, 409 F.2d 84, 86 & n.1 (1st Cir. 1969), quoted at Gov't Br. 19 & n.6) shows that Congress enacted Section 423(d)(2)(A) against the backdrop of established precedent that availability had to be shown for other work, but not for the claimant's previous work.

the Commissioner's construction. See Pub. L. No. 104-121, § 105(a)(1), 110 Stat. 852. Those "circumstances provide further evidence—if more is needed—that Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible." *Walton*, 535 U.S. at 220; *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986).

3. Respondent nonetheless asserts (Br. 8-9) that the Commissioner's construction was "first" articulated in SSR 82-40 in 1982. But that assertion ignores all that went before: the Commissioner's 1961, 1968, and 1978 regulations; the 1967 OASI Disability Insurance Letter; the administrative materials and constructions reflected in legislative reports and court decisions throughout the 1960s; and the legislative history of the 1965 and 1967 amendments.

Respondent also misreads SSR 82-40's observation that "a view commonly expressed is that a foreign job is not 'relevant' unless substantially similar work can be found in the U.S. economy." SSR 82-40 (1982 WL 31388, at *2). Attributing that view to "social security adjudicators," respondent suggests that the agency had wavered. Resp. Br. 9-10. But SSR 82-40 did not attribute that view to social security adjudicators (as distinguished from claimants or their counsel). Further, SSR 82-40 stated only that such was a common view for past "work performed in a foreign country," not domestic work. Indeed, SSR 82-40 not only rejected that view, but did so by clarifying that the Commissioner's *established rules*—which advised claimants that "[y]our impairment must prevent you from doing past relevant work"—*apply with equal force* to work performed in foreign countries. SSR 82-40 (1982 WL 31388, at *1-*2) (quoting 20 C.F.R. 404.1520(e) (1981)). "The relevance of past work in a foreign economy," the ruling thus declared, "*is no different from the relevance of past work in the U.S. economy* * * * . If a claimant can meet the * * * physical and mental requirements of a past job, he or she is still functionally capable of performing that job," even if "the individual no longer resides in the country where the past work was performed."

SSR 82-40 (1982 WL 31388, at *2) (emphasis added). The Act "does not qualify 'previous work,'" the ruling also noted, "but does specify that 'other . . . work' must exist in significant numbers in the national economy." *Ibid.* Respondent does not dispute that SSR 82-40 explicitly rejects her position.[6]

Respondent also errs in claiming (Br. 13) that SSR 82-62 "contradicts" the Commissioner's position by requiring adjudicators to find "that the individual's RFC [residual functional capacity] would permit a *return* to his or her past job or occupation"; one cannot "return" to a job, respondent argues, if it does not exist in significant numbers. But SSR 82-62's use of the conditional tense—"would permit"—belies that contention; adjudicators must find that the claimant's functional capacity *would* permit a return *if* the opportunity to do such work were presented, not that such an opportunity will be presented. SSR 82-62 (*available in* 1982 WL 31386, at *4). And SSR 82-62 explains that the ultimate question is whether the claimant "has the capacity to perform a past relevant job." SSR 82-62 (1982 WL 31386, at *4). It thus requires findings regarding the claimant's residual functional capacity and the physical and mental demands of

[6] Although respondent asserts (Br. 10-11) that SSR 82-40 failed to list the existence of former work as a factor that is "not pertinent," she overlooks the two sentences immediately following the one she quotes (as well as the ruling's unequivocal statement, quoted above, that the significant numbers requirement applies to other work but not previous work). The ability to "meet the physical and mental demands of a formerly held foreign job," those sentences explain, precludes a finding of disability whether or not that past job has "a counterpart in the U.S. economy." SSR 82-40 (1982 WL 31388, at *2). Respondent's reference (Br. 9-10) to the "practice of verifying or supplementing a claimant's description of * * * past jobs with available information about work in the U.S. economy" does not advance her cause either. Such information could be used to assess the credibility of assertions regarding the demands of past work, or to determine whether the claimant can perform that past work as it is currently performed in the United States, even if the claimant cannot do that work as it was performed abroad. See SSR 82-61 (1982 WL 31387, at *2).

the past job, but no findings regarding whether the past job exists in significant numbers in the national economy. *Ibid.*[7]

C. Respondent's Policy Arguments Are Unavailing

1. Respondent errs in contending that the regulations governing step five of the sequential evaluation process —the "Medical-Vocational Guidelines" or "grid regulations" found in 20 C.F.R. Part 404, Subpart P, Appendix 2— "prove" as a matter of "statistical science" that "there are no jobs existing in significant numbers in the national economy" that respondent can perform. Resp. Br. 29, 39-40. The regulations used at step five were developed to improve "both the uniformity and efficiency" of the inquiry into whether a claimant who cannot perform her previous work can nonetheless adapt to "other * * * work which exists in the national economy" in "significant numbers." *Heckler* v. *Campbell*, 461 U.S. 458, 460-462 (1983). To that end, the regulations establish grids that take administrative notice of jobs requiring work at various exertion levels (sedentary, light, and medium work) and factor in the claimant's age, education, and work experience, to "direct" an administra-

[7] Respondent's reliance (Br. 12-13) on the "relevance" requirement articulated in SSR 82-62 is similarly misplaced. That ruling provides that past work will not be considered—it will be deemed "not relevant" as an evidentiary matter in determining the claimant's capacity for work—if it was performed more than 15 years ago, or only for a short time. SSR 82-62 (1982 WL 31386, at *2). The 15-year cut-off establishes a limited, bright-line presumption that makes claims resolution easier by ordinarily eliminating the need for claimants to list and adjudicators to examine every job the claimant held during her potentially long life. See SSA Program Operations Manual System (POMS) DI 11005.023, DI 11005.025. As such, it is a permissible exercise of the Commissioner's authority to "fill in" necessary details related to program administration. *Walton*, 535 U.S. at 225. The Commissioner's regulations regularly use such presumptions to promote efficiency and uniformity. See *Cleveland* v. *Policy Mgmt Sys.*, 526 U.S. 795, 804 (1999); *Heckler* v. *Campbell*, 461 U.S. 458, 461-462, 468 (1983). That the Commissioner has established a bright-line, 15-year rule that promotes uniformity and efficiency does not mean that she must also adopt rules, like respondent's, with the opposite effect.

tive conclusion that the claimant can (or cannot) make an adjustment to such other work. See *id.* at 461, 462 & n.3; 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 202.00(a), (b).

However, like other steps of the sequential process, the grids "embod[y] a set of presumptions about disabilities, job availability, and their interrelation" that, while necessary "to administer a large benefits system efficiently," must "inevitably simplify, eliminating consideration of many" factors. *Cleveland* v. *Policy Mgmt. Sys.*, 526 U.S. 795, 804 (1999). As the government's amicus brief in *Cleveland* explained (at 12), "[b]ecause of the * * * generalized presumptions," even "a finding that a person is disabled * * * does not" necessarily "mean that there is no job that he can perform."

For example, the grid regulation respondent invokes (Br. 28-29) directs a finding of "disabled" for a claimant over age 55 who can do light work but has limited education and no transferable skills. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table No. 2, Rules 202.01, 202.02; 20 C.F.R. 404.1563(e), 416.963(e). In fact, however, the rules take administrative notice of *1600 unskilled occupations* that can be performed by persons having the capacity for light work, and each occupation may represent thousands or tens of thousands of jobs in the national economy. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 202.00. To promote efficiency and uniformity, the grid regulation nonetheless directs a finding of disability, conclusively presuming that no claimant over 55 who is unable to do her previous work, who has a limited education, and who lacks transferable skills can adjust to jobs in those 1600 categories. The grids, moreover, evaluate whether claimants who have impairments that prevent them from doing their past work can adjust to other work, 20 C.F.R. 404.1569, 416.969, not the adjustment capacity of claimants who have suffered no life change aside from the loss of (or a decision to leave) a particular past job.

It is precisely because the grids used at step five must incorporate so many generalizations that the previous work inquiry at step four is so critical. See Gov't Br. 42, 43-44.

Unlike the grids, the previous work inquiry looks solely to the claimant's individually determined capacity and the concrete demands of the work she has performed in the past.[8] Court after court has recognized that ability to perform "past relevant work" serves to show that the claimant "is able to do a certain level of work," whether or not that particular job exists in significant numbers. Pet. App. 18a, 23a (Rendell, J., dissenting). It is a "gauge by which to measure the" claimant's "capabilities * * * rather than a means by which to assure that [she] can actually find employment." *Pass*, 65 F.3d at 1204; *Quang Van Han*, 882 F.2d at 1457 (if a claimant has the capacity "to perform his previous work, his impairment is clearly not so severe as to preclude employment"). By eliminating that needed gauge, and remitting the Commissioner to presumption-laden grids whenever the claimant has left an unusual occupation, respondent would undermine the accuracy of disability determinations.

Respondent's claim that the grid regulations prove that she is unable to work also ignores the ALJ's extensive findings in this case at step four of the sequential evaluation process (see Gov't Br. 9-10),[9] and his conclusion that "there is considerable question as to whether there is even a 'severe' impairment" that would allow respondent's case to proceed beyond step two. Pet. App. 42a. That second step "identi-

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[8] The fact that "previous work" is concrete and limited by the claimant's experience also explains the different treatment of "previous work" and "other * * * work." It makes sense that Congress, in enacting Section 423(d)(2)(A), would have seen no reason to place additional limits on the circumscribed category of "previous work" the claimant has done, but would have found it appropriate to limit the otherwise expansive category of "other * * * work"—a category that includes myriad jobs the claimant has never performed—by requiring that such other work "exist in the national economy" in significant numbers.

[9] Respondent does not dispute the ALJ's findings that the record does not support her claim of disability from hypertension or cardiac arrhythmia, Pet. App. 40a; from what she characterized as a stroke, *id.* at 43a; or from lower back pain or a right ankle fracture, *id.* at 42a-43a.

f[ies] at an early stage those claimants whose medical impairments are *so slight* that it is unlikely they would be found to be disabled." *Yuckert*, 482 U.S. at 153 (emphasis added). Respondent also ignores the ALJ's finding that respondent "retains the functional capacity for work through at least a light level of exertion." *Id.* at 43a; *id.* at 44a-45a ("capacity to perform work-related activities except for perhaps medium and heavy lifting and extensive bending and stooping"). And she ignores the district court's extensive analysis agreeing with the ALJ's assessment of the relative insubstantiality of her impairments. Pet. App. 28a-31a; Gov't Br. 11. There is thus particular reason for confidence that respondent's ability to do her former work manifests capacity to work generally.

2. Respondent's assertion that the Commissioner's construction yields absurd results, moreover, rests on the unrealistic scenario of actual claimants who are physically and mentally capable of doing *only* their past work, and no other job. Even the majority opinion below agreed that such would be an unusual case, Pet. App. 12a-13a n.5, a conclusion supported by the longevity of the Commissioner's construction and the absence of any evidence that it has disqualified real-life claimants who meet the hypothetical profile respondent posits. There is no evidence that Congress indulged such a remote hypothetical, or intended to fashion the standards for an enormous program with millions of claims each year to accommodate it. Indeed, when explaining Congress's decision to make the claimant's age irrelevant when determining her ability to perform past work, respondent declares that, although "the claimant might be a few years older," that "would rarely, if ever, pose any hurdle to the resumption" of previous work. Resp. Br. 24. Similar logic applies here. Congress reasonably chose to make the "significant numbers" requirement irrelevant to the "previous work" inquiry because "rarely, if ever," would a claimant be able to do her particular past job but no other. Congress, moreover, presumably understood that many people might

hold jobs that do not exist in significant numbers in the national economy. There is no reason to suppose that Congress wanted to entitle individuals leaving such jobs to greater access to benefits than everyone else.

Respondent's position would also undermine the efficiency of disability determinations, introducing into step four a potentially complex inquiry into whether the past work the claimant is medically capable of performing exists in significant numbers in the national economy. Because the evaluation process is non-adversarial, the Commissioner must "investigate the facts and develop the arguments both for and against granting benefits." *Sims* v. *Apfel*, 530 U.S. 103, 110-111 (2000). And by injecting that inquiry into the fourth step, respondent would contravene Congress's undisputed intent that Section 423(d)(2)(A) reemphasize the predominance of medical over other factors. Gov't Br. 38-39. "[T]o consider the presence of jobs in the national economy at step four * * * would risk transforming a predominantly medical determination into one with practical availability of employment at its center and would thus undercut a fundamental policy of the Act." *Garcia*, 46 F.3d at 559.[10]

Finally, the Commissioner's longstanding construction is consistent with Congress's purpose to establish an administrable program of disability insurance, not insurance against economic change or unemployment. See Gov't Br. 46-47. As the district court observed, disability insurance "provides for people who physically are incapable of performing the type

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[10] Respondent's claim that "the second step * * * satisfies the Congressional intention that medical factors assume primacy," Resp. Br. 23, is without merit. The second step merely "identif[ies] at an early stage those claimants whose medical impairments are *so slight* that it is unlikely they would be found to be disabled." *Yuckert*, 482 U.S. at 153 (emphasis added). Even though Congress's goal in enacting Section 423(d)(2)(A) was to emphasize "the predominant importance of medical factors" over economic considerations, S. Rep. No. 744, *supra*, at 48, respondent argues that Congress in fact did the opposite, introducing job-market considerations into the otherwise clear fourth step of the sequential evaluation process.

of job they did in the past; it "does not provide for people who lost their job." Pet. App. 28a. Private disability insurance policies—to which Congress often looked in drafting disability standards, *e.g.*, H.R. Rep. No. 213, *supra*, at 89 (duration); S. Rep. No. 1987, *supra*, at 20 (waiver of premium) —typically also require that the claimant's impairment be the reason for the inability to perform previous work.[11]

For all these reasons, respondent is simply wrong in asserting that the Commissioner's longstanding implementation of the disability insurance and SSI programs should be rejected as unrealistic or absurd. To the contrary, that construction is supported by the statutory text, is reflected in legislative history, furthers statutory purposes, mirrors general disability insurance principles, and is embedded in the program's evolution and ongoing operation with respect to millions of claims annually. Respondent may prefer a different type of insurance or greater coverage. But she has not demonstrated that the Act "demand[s] that the Agency make" that preference "an overriding interpretive principle." *Walton*, 535 U.S. at 225.

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For the foregoing reasons and those stated in the government's opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

THEODORE B. OLSON
Solicitor General

AUGUST 2003

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[11] See, *e.g.*, Berkshire/Guardian Disability Policy 4 <http://www.guardiandibrokerage.com/pdf/1100-specpolicy.pdf> (disability "means that, *because of* sickness or injury, you are not able to perform the material and substantial duties of your occupation") (emphasis added); see S. Crawford, *Definition of Total Disability* <http://www.about-disability-insurance.com/totaldisability.html> (insured must show that, "*because of* a covered sickness or accident," she has an "inability to perform the material and substantial duties of [her] occupation") (emphasis added).